

DOCUMENT RESUME

ED 473 379

EA 032 398

AUTHOR Helvey, Sarah; Risch, Judith
TITLE Chicago Public Schools' Promotion Policy: Potential Due Process Violations and Title VI Implementations.
PUB DATE 2002-11-00
NOTE 17p.; In: Balancing Rights: Education Law in a Brave New World. Papers [of the] Education Law Association (ELA) Annual Conference (48th, New Orleans, LA, November 14-16, 2002); see EA 032 361.
PUB TYPE Information Analyses (070) -- Speeches/Meeting Papers (150)
EDRS PRICE EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS Academic Achievement; Academic Failure; Accountability; Court Litigation; *Due Process; Educational Assessment; Elementary Secondary Education; *Equal Protection; *High Stakes Tests; *Public Schools; School Law; Standardized Tests; State Courts; *Student Promotion
IDENTIFIERS *Chicago Public Schools IL; *Civil Rights Act 1964 Title VI

ABSTRACT

This paper--part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002--discusses high-stakes testing. Specifically, it examines the high-stakes testing program in Chicago public schools, a grade-promotion policy that uses a standardized test as the primary basis for promotion. Although there are many legal concerns related to high-stakes testing, this paper limits its discussion to how high-stakes testing relates to equal protection, due process, and Title VI of the Civil Rights Act of 1964. In its discussion, this paper examines the following topics in varying degrees of detail and complexity: (1) major legal precedents and court cases involving testing; (2) claims under Title VI that high-stakes tests are illegally discriminatory; (3) definitions of due process; (4) details of Chicago public schools' promotion policy; and (5) a legal analysis of Chicago public schools' promotion policy. The paper concludes that there should be concern about different schools' approaches to preparing students for assessments. Legal attention should follow the implementation and execution of accountability programs to ensure that due process, Title VI, and other educational deprivations do not occur. (Contains 47 endnotes, most of which are references to court cases.) (WFA)

Reproductions supplied by EDRS are the best that can be made
from the original document.

**Chicago Public Schools' Promotion Policy:
Potential Due Process Violations and Title VI
Implementations.**

Sarah Helvey
Judith Risch

November 2002

U.S. DEPARTMENT OF
EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☒ This document has been reproduced as
received from the person or organization
originating it.

☐ Minor changes have been made to improve
reproduction quality

• Points of view or opinions stated in this
document do not necessarily represent
official OERI position or policy.

PERMISSION TO REPRODUCE AND
DISSEMINATE THIS MATERIAL IN MICROFICHE,
AND IN ELECTRONIC MEDIA FOR ERIC
COLLECTION SUBSCRIBERS ONLY,
HAS BEEN GRANTED BY

R. Wagner

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)

2A

Chicago Public Schools' Promotion Policy:
Potential Due Process Violations and Title VI Implications

Sarah Helvey
Judith Risch, J.D., M.S.

University of Wisconsin – Madison
Department of Educational Administration
Education Sciences Building
1025 West Johnson Street
Madison, WI 53706

E A 0 3 2 3 9 8

Background

- Recent emphasis on accountability in education has resulted in high stakes testing policies to measure the achievement of:
 - Individual Students - for tracking, promotion, and graduation purposes, and
 - Schools – now mandated in the reauthorization of the Elementary and Secondary Education Act (ESEA), aka the No Child Left Behind Act of 2001 (for grades 3-8).¹
- High Stakes Testing of individual students is widespread:
 - In 2000, the Council of Chief State School Officers reported that 19 states had a policy requiring students to pass an exit exam in order to receive a high school diploma. Nine states reported being in the development phase of such a policy.²
- Legal Concerns related to high stakes testing include:
 - Equal Protection and Title VI of the Civil Rights Act of 1964 (Title VI)
 - Due Process
 - Individuals with Disabilities Education Act (IDEA)
 - Issues surrounding English Language Learners
 - ✓ **This paper will be limited to discussion of Equal Protection, Title VI, and Due Process as it relates to high stakes testing. In particular, this paper will examine one particular high stakes testing program, a grade promotion policy which utilizes a standardized examination as the primary basis for retention decisions.**
- Major Legal Precedents:
 - *Debra P. v. Turlington*³
 - This case involved a challenge to a Florida legislative amendment to the Educational Accountability Act of 1976, which required that public school students pass a functional literacy exam in order to receive a high school diploma.⁴
 - The plaintiffs (students who did not pass the exam) argued that the test-for-diploma scheme perpetuated the effects of prior discrimination, denying them equal protection of the law, and that the test-for-diploma scheme was unfair because the test was invalid and the diploma sanction was imposed too hastily, denying them due process.⁵
 - The plaintiffs argued that there was insufficient time (2 years) between the initiation of the program and its implementation was not enough time to successfully match the curriculum and instruction to the test.⁶

- The plaintiffs also argued that there were other alternatives to the testing scheme, such as longer-term remediation, more time between implementation and test administration, and phasing in the state objectives.⁷
- The plaintiffs also argued that the test violated the equal protection clause because 57 percent of the (12th grade) students who failed the test were African-American, while African-Americans constituted only about 20 percent of the student body.⁸
- The district court issued a four-year injunction on the use of the test as a diploma requirement until no students taking the test had attended school in the non-unitary (segregated) system.⁹
- In 1983, after lifting the injunction, the Court of Appeals remanded the case for a determination as to whether the test was content valid – whether it measured what the students were being taught in class. In this decision, the appellate court reasoned that “if the test is not fair, it cannot be said to be rationally related to a state interest.”¹⁰ The Court of Appeals also examined the equal protection claim, clarifying that in order for the district court to prohibit the use of the test as a diploma sanction, it must be determined that the disparate impact was caused by “past purposeful segregation or its lingering effects.”¹¹
- The district court found that the defendants met their burden of proving that the test was instructionally valid (skills were included in the official curriculum and the “majority of teachers recognize them as being something they should teach”).¹² Furthermore, the court was satisfied by the fact that the defendants had in place procedures for review of instructional programs, as well as remediation for students who did not pass the test.¹³
- The district court dismissed the equal protection claim, essentially asserting that – twelve years after becoming unitary – Florida students received the same textbooks, curricula, libraries, and attendance requirements and, thus, a test like the one used (i.e. one that is objective and standardized) could instead contribute to the eradication of past racial inequalities.¹⁴
- *GI Forum v. Texas Education Agency*¹⁵
 - In January of 2000, nine Texas high school students who did not pass the state high school graduation exam, the Texas Assessment of Academic Skills (TAAS), brought suit against the Texas Education Agency, alleging that the TAAS was unconstitutional on the grounds that it violated their due process rights by withholding their high school diploma.¹⁶

- The students also argued that the TAAS violated Title VI of the Civil Rights Act of 1964 because the test had disparate effects for minority students.¹⁷ The court noted that, "In every administration of the TAAS since October, 1990, Hispanic and African American students performed significantly worse on all three sections of the graduation test than majority students."¹⁸
- The U.S. District Court for the Western District of Texas found that the TAAS did not violate the due process clause because the Texas Education Agency sufficiently showed that its testing policy was in line with established state standards designed to "reflect an insistence on standards and educational policies that are uniform from school to school."¹⁹ The due process claim was dismissed because it was found that the state standards mandated that the test match the state's curricular goals.²⁰
- Furthermore, the Texas Education Agency argued successfully that, although disparate effects on the TAAS did exist, the discrepancy in passing scores was improving for minority students, and that the scores of minority students in Texas are higher than that of minority students nationally.²¹
- Consequently, because the plaintiffs were unable to show that a "nexus" existed between the disparities and the TAAS, and because they "failed to prove that the policies are unconstitutional, that the adverse impact is avoidable or more significant than the concomitant positive impact, or that other approaches would meet the State's articulated legitimate goals," the court found the TAAS permissible as a graduation requirement.²²
- Equal Protection/Title VI and Due Process
 - Equal Protection/Title VI
 - With regard to high stakes testing, three claims have typically been made to argue that tests are illegally discriminatory: intentional discrimination under the Equal Protection Clause, preservation of the effects of past discrimination under the Equal Protection Clause and disparate impact under Title VI of the Civil Rights Act of 1964.²³
 - Intentional discrimination is arguably the most difficult of these to establish as plaintiffs must show that a school district foreseeably implemented a policy at least in part because of the adverse effects it would have on a protected group – a difficult standard to prove. The past discrimination claim was the issue addressed by in *Debra P.*, specifically, at what point test score differences were due to past discrimination.²⁴ The court finally found that to the extent that differences could have been attributable to past discrimination (students taking the test themselves

attended a non-unitary school), the tests were not permissible.²⁵ However, once all students taking the test attended unitary schools, the test policy was allowed.²⁶

- The claim of disparate impact under Title VI, on the other hand, is a very viable charge against high stakes testing programs. Title VI of the Civil Rights Act of 1964, the enforcement legislation to the Fourteenth Amendment, prohibits programs receiving federal funds from discrimination on the basis of race or national origin. Under this federal civil rights statute, students and parents (as part of public schools receiving federal funding) may file complaints with the U.S. Department of Education's Office for Civil Rights (OCR), which has a procedure for reviewing such complaints, determining whether illegal activity has occurred, and imposing sanctions (i.e., loss of federal funds).²⁷
- Lower courts in many jurisdictions have recognized a three-part test to establish claims under Title VI. First, the plaintiffs must show by a preponderance of the evidence that the policy resulted in a disproportionate adverse impact to a protected group. If this is established, the burden shifts to the defendants to justify its policy's "educational necessity." Some courts have interpreted "educational necessity" to mean that defendants must show the policy has a "substantial legitimate justification." Other courts have required that the defendant show that there exists a "manifest relationship" between the test and the defendant's educational objectives.²⁸

o Due Process

- Substantive Due Process - it must be found that the mission or goals of a testing policy are "reasonable" and serve a "legitimate state interest."²⁹
- Procedural Due Process - students must be given the opportunity to learn tested skills upon which denials of education are based, and notice of a district's testing policy.³⁰

CPS Promotion Policy – 00-0823-PO4

- The purpose of the policy is to provide standards for promoting elementary school students. The promotion guidelines demonstrate key objectives of the Chicago Board of Education:
 - ✓ The promotion of high educational standards for students
 - ✓ Consistency in educational opportunities provided to all students
 - ✓ Implementation of a plan of system-wide monitoring to verify the quality of instruction and type of instructional materials provided to students are calculated to achieve student mastery of the skills and knowledge which are assessed in making promotion decisions

- ✓ Ensuring that the district's educational objectives are met in a fair and non-discriminatory manner
- Effective with the start of the 2000-2001 school year
- Students in the 3rd, 6th and 8th grades ("the benchmark grades")
- Promotion is based on possession of the knowledge and skills appropriate to student's grade level as demonstrated by their performance on multiple measurements including the ITBS, and as appropriate, the assessment of other factors (described below).

Students at the benchmark grades who have a score:

- **at or above** designated ITBS scores and have passing grades in reading and mathematics shall be automatically promoted to the next grade.
- **below** the ITBS cut-off scores, shall have additional criteria reviewed automatically by the Office of Schools and Regions to determine promotion to the next grade. Students who meet all seven of the criteria or who have one or more significant deficiencies on the additional assessments are promoted to the next grade with satisfactory completion of mandatory summer school. These criteria that are considered include:
 - 1) classroom grades of B or better in reading and mathematics for the academic year
 - 2) passing reading and mathematics unit test scores
 - 3) evaluation of student's score on the Illinois Student Assessment Test (ISAT) or any state-sanctioned assessment that demonstrates the students' competencies in math and reading at the appropriate grade level
 - 4) evaluation of the student's prior year score on the ITBS (i.e., attainment of a score in the previous year within the range indicated that the student mastered grade level material in reading and mathematics)
 - 5) student's attendance during the academic year at a rate of 90% or better
 - 6) student's consistent completion of homework assignments during the academic year
 - 7) student's conduct during the academic year (i.e., the absence of any significant discipline infractions)
- **below** the ITBS cut-off scores or have a failing final report card grade in reading or mathematics or have more than 20 days unexcused absences will not be promoted to the next grade unless they: (1) satisfactorily complete of summer school (2) maintain attendance at a rate of 90% or better (3) pass a re-test of the ITBS in August. Students whose scores fall below the minimum range scores shall be retained at grade level³¹.

- Monitoring of Instruction - To ensure consistency throughout the school system and that there is a strong alignment between the test and other assessment criteria, the curriculum, and classroom instruction, CPS has undertaken the following steps:
 - ✓ The Office of Schools and Regions and the Office of Accountability will implement a system for monitoring classroom instruction that includes random unannounced visits
 - ✓ All elementary schools where aggregate student reading scores on the ITBS indicate that less than 50% of the school's students tested at or above the national norms, may be required to use a standardized reading curriculum provided by the Department of C&I.
 - ✓ A district-wide Textbook Committee will develop a list of recommended texts, and the committee may mandate the use of specific textbooks to ensure the greatest possible correlation to grade level instruction and shall develop procedures for effectively monitoring the purchase of instructional materials at the individual school level.

- Additional Support for Students Determined to be Academically at Risk – For students who have a deficit in classroom grades and/or who have excessive unexcused absences, one or more of the following additional types of support may be provided:
 - 1) Mandatory attendance in an extended day ("Lighthouse") program
 - 2) Required participation in after-school tutoring in a small group or on an individualized basis
 - 3) Participation in daily pullout class for remedial instruction in reading and/or mathematics
 - 4) Provision of after-school assistance with homework assignments

- The District may implement the use of a "contract" developed for the student with the participation of the teacher(s) and parent or guardian of the student. The contract will establish general progress objectives for the student each semester which will be reviewed weekly by the teacher and provided to the parent or guardian with a requirement for a sign-off by the parent. Quarterly parent/student/teacher conferences will be held to discuss student progress.

- This individualized academic support may be available to students who consistently test two years or more below the grade level on the ITBS.

- Parental Notification – principals are required to notify parents in writing of the promotion policy beginning with the first week of the school year and prior to October 1st of each

school year. The policy will clearly articulate the right of a parent/guardian to seek review of the District's determination not to promote a student.

- At the end of the 5th, 15th, 50th, 20th, 25th, 35th and 30th week, parents shall be notified in writing if their child is in danger of receiving a failing grade in reading or mathematics.
- Student assistance shall be provided at the earliest point a child is identified as being at risk for obtaining a failing grade.
- If a student receives a failing grade at the end of the 20th week, notification must be sent to the student's parent/guardian by certified mail.
- If the parent or guardian does not attend a Report Card pick up conference at the 30th week, notification must be sent to the student's parent/guardian by certified mail.
- Within 10 days of the receipt of the ITBS scores, parents must be notified regarding whether their child will be promoted and whether summer school attendance is required.
- Notice will include a copy of the Review procedures (below). Finally, if a student has accumulated 10 days of unexcused absences (including absences created by an out of school suspension), schools shall be required to notify the parents or guardian by certified mail that the student may be required to attend summer school. Notification is also made at 15 and 20 days of unexcused absences.
- Request for Review of Promotion Determination – within 10 calendar days from the date the promotion decision is communicated to the parents/guardian, a parent/guardian or the principal of the school which the students attends has the right to request review of the determination that the student not be promoted in June and is required to attend summer school. The request must be in writing to the Office of Schools and Regions, which will undertake a review of the student's performance, based on the established criteria and any other evidence of acceptable reading and math skills and knowledge and shall notify the parent/guardian within 5 days of the decision to grant exemption from this policy.
- Assessment Validation and Maintenance of Data – The District will on a periodic basis review the use of the ITBS, in part, as a factor in determining student mastery of reading and mathematics skills. The District will maintain all testing data by race and national origin of test takers and shall annually review this data with regard to students who are promoted and retained pursuant to the requirements of the policy in order to ensure that there is no disparate impact based on race or national origin created by the operation of the policy. Such data shall be made available to any parent upon request.

105 ILCS 5/10-20.9a Final Grade; Promotion

(a) Teachers shall administer the approved marking system or other approved means of evaluating pupil progress. The teacher shall maintain the responsibility and right to determine grades and other evaluations of students within the grading policies of the district based upon his or her professional judgment of available criteria pertinent to any given subject area or activity for which he or she is responsible. District policy shall provide the procedure and reasons by and for which a grade may be changed; provided that no grade or evaluation shall be changed without notification to the teacher concerning the nature and reasons for such change. If such a change is made, the person making the change shall assume such responsibility for determining the grade or evaluation, and shall initial such changes.

(b) School districts shall not promote students to the next higher grade level based upon age or other social reasons not related to the academic performance of students. On or before September 1, 1998, school boards shall adopt and enforce a policy on promotion as they deem necessary to ensure that students meet local goals and objectives and can perform at the expected grade level prior to promotion. Decisions to promote or retain students in any classes shall be based on successful completion of the curriculum, attendance, performance based on Illinois Goals an assessment Program tests, the Iowa Test of Basic Skills, or other testing or any other criteria established by the school board. Students determined by the local district to not qualify for promotion to the next higher grade shall be given remedial assistance, which may include but not be limited to, a summer bridge program...modifications to instructional materials, and retention in grade.

Legal Analysis of the CPS Promotion Policy

A. Title VI

1. Disparate Adverse Impact

- A possible challenge to the CPS promotion policy might be raised under Title VI based on the disparate adverse impact in ITBS scores by race.
- In Chicago, there were disparities in the 2000 results from the ITBS tests. African American students were almost three and a half times more likely than white students to score in the bottom national quartile on the reading comprehension section of the ITBS. Similar differences also occurred in the math scores on the ITBS.³² (Data from the 2000 administration of the ITBS are the most recent data publicly available broken down by race.)

2. Nexus between testing and score disparities

- To establish disparate impact under Title VI a party would have to show a "nexus" between the score disparities and students' race or national origin.

- In *G.I. Forum* the Texas court did not find a link between the high-stakes test result and the students' race. Instead, the Texas Education Agency argued successfully that the accountability system was established with knowledge of the probable disparities, and the system was an attempt to establish standards and policies uniform from school to school.³³
- Chicago Public School's purpose of the promotion policy is a way of "insuring that there is consistency in the educational opportunities provided to all students". Thus, based on this assertion it is probable the policy would be similarly viewed as Texas's program. CPS could argue it is trying correct a disparity and thus it would prevail on this argument as long as its actions are consistent with the statements made.
- The court in *G.I. Forum*, however, found that although there was a disparate impact of the high-stakes testing on minority students it was smaller difference than seen nationally.³⁴ This does not appear to be the case for Chicago. In Chicago there is a quite large percentage of minority students scoring in the lowest national quartile on the ITBS as compared minorities nationally. Thus this portion of *G.I. Forum* may not be applicable to Chicago.

3. Educational Necessity

- If disparate impact and a nexus between the ITBS and score disparities is found, the burden shifts to the school district to show the policy's educational necessity.³⁵
- In *GI Forum*, for example, the court found disparate impact of the test but ruled that the graduation requirement was "educationally necessary."³⁶
- Coleman and Peabody,³⁷ assert if the test "doesn't make educational sense, it can't make legal sense under federal civil rights laws." Thus if there is no educational justification the use of the test will be invalid.
- Heubert and Hauser,³⁸ also assert that a court will be more likely to strike a high-stakes test when "the consequence of a test is a low-quality program or placement rather than one that is 'educationally necessary'..."
- A wealth of social scientific research has indicated a myriad of negative sequelae related to retention, including higher dropout.³⁹ While the argument could be made that retention is not "educationally necessary" courts typically defer to school officials in making such determinations. The district could claim that their testing program, balanced by an alternative method by which students can be promoted, is actually designed to address the disparities and eventually close them, thus realizing their intent.

B. Due Process

1. **Substantive due process** analysis consists of an examination of the legitimacy of the mission of the governmental program as to whether or not the program serves a "legitimate state interest" and is "reasonable".
 - Chicago Board of Education policy 00-0823-PO3 states the following purpose the central objectives of the policy as:
 - (a) The promotion of high educational standards for its students;
 - (b) Ensuring that there is consistency in the education opportunities provided to all students;
 - (c) Implementation of a plan of system-wide monitoring to verify that the quality of instruction and type of instructional materials provided to students are calculated to achieve student mastery of the skills and knowledge which are assessed in making promotion decisions; and
 - (d) Ensuring that the district's educational objectives are met in a fair and non-discriminatory manner.
 - Based on these articulated reasons for the policy it is likely that a court would find a "manifest relationship" between the test and the educational mission of the policy, thus sustaining the reasonableness of the policy on due process grounds.
2. **Procedural due process** analysis consists of an examination of whether there is sufficient advance notice of the promotion requirement and the nature of the test so that students have a fair opportunity to pass it. Procedural due process also involves whether the policy provides students and parents with an opportunity to be heard on matters relating to the policy.⁴⁰
 - The CPS policy requires parental notification of the promotion policy by the "beginning with the first week of the school year and prior to October 1st of each school year" from the school principal in writing. *Debra P. v. Turlington* held four years notice was sufficient, while other courts have found that two years was not.⁴¹ Thus, CPS notification of six months may be insufficient.
 - The CPS policy provides some procedures by which students and parents are given an administrative review of a retention decision. The CPS policy states in Section 7 that:

...within 10 calendar days from the date the promotion decision is communicated to the parents/guardian, a parent/guardian or the principal of the school which the student attends has the right to request review of the determination that the student not be promoted...The review procedures will be provided to the parents/guardians in writing...All such requests for review shall be in writing and shall contain the following information: the cumulative grade card, attendance record, conduct

information, and whether the student has a disability...The request forwarded shall be directed to the Office of Schools and Regions...

This administrative review should be adequate process to meet procedural due process requirements. There is further process provided when the student is given with remediation to avoid retention.

- Courts have required a showing that the test measures material which the school has actually taught students. In *Anderson v. Banks*,⁴² a federal district court required a school district to illustrate that the questions of the California Achievement Test (CAT) had actually been covered in the curriculum before allowing the test to be used as an exit exam. While in *Debra P*, the court accepted a study conducted on behalf of the defendants as to the validity of the graduation test.⁴³ Under the CPS policy there is to be a curricular and instructional match. The policy provides:

[To] ensure that student achievement is maximized, that the utilization of the designed educational criteria is done in a manner that ensures consistency throughout the school system, and that there is a strong alignment between the tests and other assessment criteria, the curriculum, and classroom instruction.

If this policy is consistently followed and there is a curricular and test match the likelihood of a successful challenge is minimal. Although required by precedent and CPS policy, it is possible that even though the official curriculum specifies the skills and knowledge to be taught and teachers recognize as something they *should* teach, in practice they may fail to adequately do so.

- Courts have sympathized with the possibility that some students will be unfairly tested in individual classrooms in which there is little or no instructional match. However, the court in *Debra P* found that such cases are exceptions rather than the rule, and the occurrence might not rise to the level of a constitutional infringement.⁴⁴ CPS has tried to minimize the variance. Under Section 4 the district may perform random, unannounced classroom visits; implement a standard reading curriculum; committee mandated use of mathematics and reading textbooks; and committee monitoring of instructional materials. It could be argued that these steps are not sufficient or practically effective. Again, though, courts tend to yield to districts' stated efforts, while remaining hesitant to make what they see as professional judgments. This tendency was seen in *G.I. Forum v. Texas Education Agency*, in which the due process claim was dismissed as it was found that the state standards mandated that the test match

the stated goals of the curricula.⁴⁵ Coupled with a finding that the testing program was in line with these standards, the due process claim failed.

C. Other Concerns

- The possibility that CPS uses the ITBS beyond what the ITBS publishers recommend as appropriate use of the test may be legally problematic. In *U.S. v. Fordice*⁴⁶, the Supreme Court struck down the exclusive use of ACT composite scores in making college admissions decisions because the ACT user's manual recommended that such decisions be based on ACT subset scores, self-reported high school grades, and other factors. CPS principally uses the ITBS in making promotion decisions and, while other factors are considered, failure to achieve a cut-off score on the ITBS is the ultimate determinant of whether a student will be promoted. The test failure is the "ultimate" determinant of whether a student is promoted. It is only the ultimate determinant of whether additional data is necessary to make the decision. If a child fails, s/he may still be promoted through the alternative mechanism. Whether it's fair to make all kids who fail the ITBS attend summer school if all other indicators suggest the child is achieving, is another matter. Publishers of the ITBS warn against the test being used as a sole criterion in educational decision making.
- Despite legal concerns of the CPS promotion policy, courts are typically reluctant to get involved in educational decision making of schools thus the ability to challenge a retention decision is limited. Most courts are deferential to policy decisions made by the schools.
- A final issue related to high-stakes testing is the practice of "teaching to the test". While due process requires that students are given the opportunity to learn the material that is being tested, the flip side of this is that, in some cases, there may be a concern that instruction is *too* matched to the test, such that the testing policy too rigidly dictates classroom practices. This is purely an educational concern – not a legal one – but it nonetheless raises issues to be considered in the current climate of high stakes testing and accountability policies. In 1998, a teacher within the Chicago Public School System wrote:

...I am alarmed at the increasing number of people, including teachers, who are beginning to view the ITBS as the goal of our educational program and not just an assessment tool....I was surprised when teachers at one West Side school indicated they had to put away their reading books after December until testing was over in the spring so they could concentrate on practice tests. Several teachers on the South Side have told me that their schools were purchasing test-taking materials and so couldn't spend as much on books for classroom libraries...One principal confessed that he knew what good instruction looked

*like, but he couldn't spend staff development money on it until his scores went up. Unfortunately, when I talk with teachers and principals from across the city, it's evident that at many schools the ITBS tests and test-taking skills are becoming the curriculum, and good instruction is suffering.*⁴⁷

Clearly there should be concern about different schools' approaches to preparing students for the ITBS. Thus, legal attention should follow the implementation and execution of accountability programs to insure that due process, Title VI, and other educational deprivations do not occur.

Note: Final version of this article will be printed in the Fall 2002 Issue, Volume 22, Number 3, of the Children's Legal Rights Journal. The CLRJ is edited by students at the Loyola University of Chicago School of Law and the ABA Center on Children & the Law, and is published by William S. Hein & Co., Inc. Subscription information is available by calling the publisher at (800) 828-7571.

¹ PL 107-110

² Key State Education Policies in K-12 Education (p. 16) found at http://publications.ccsso.org/ccsso/publication_detail.cfm?PID=195

³ *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part and rev'd in part*, 644 F. 2d 397 (5th Cir. 1981), remand, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984);

⁴ *Id.*

⁵ 564 F. Supp. 177, 179-180.

⁶ 474 F. Supp. 244, 267.

⁷ *Id.* at 268-9.

⁸ 564 F. Supp. at 186. See also, 474 F. Supp. at 262, 248-9.

⁹ 474 F. Supp. at 269.

¹⁰ 564 F. Supp. at 180.

¹¹ *Id.* at 186.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 188-189.

¹⁵ *G.I. Forum v. Texas Education Agency*, 87 F. Supp.2d 667 (W.D. Tex 2000).

¹⁶ *Id.* at 668

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 670.

²⁰ *Id.*

²¹ *Id.* at 677.

²² *Id.* at 671

²³ U.S. Constitution, Amendments V and XIV, Civil Rights Act, 42 U.S.C. § 2000d (2001).

²⁴ 564 F. Supp. 177, 186-9

²⁵ *Id.*

²⁶ *Id.*

²⁷ Civil Rights Act, 42 U.S.C. § 2000d (2001).

²⁸ See HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 59 (Jay P. Heubert & Robert M. Hauser eds., National Academy Press 1999) and cases cited therein.

²⁹ 87 F. Supp.2d 667, 682-683.

³⁰ 564 F. Supp. at 177.

³¹ The policy also contains a provision relating to students with disabilities but they are not considered for purposes of this paper.

³² Data available at <http://www.cps.k12.il.us>

³³ 87 F. Supp.2d at 670.

³⁴ *Id.* at 677.

³⁵ The Courts, Validity, and Minimum Competency Testing. (George F. Madaus, ed., Boston: Kluwer Nijhoff Publishing 1983).

³⁶ 87 F. Supp.2d at 670-671.

³⁷ A.L. Coleman, *Framework for Addressing Student Test Issues*. Paper presented at the Annual Education Law Association Conference, Atlanta, Georgia (November, 2000).

³⁸ HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 57-62 (Jay P. Heubert & Robert M. Hauser eds., National Academy Press 1999).

³⁹ FLUNKING GRADES: RESEARCH AND POLICIES ON RETENTION, 64-79 (Lorrie A. Shepard and Mary L. Smith, eds. The Falmer Press 1989).

Stuart Luppescu, Anthony S. Bryk, Paul Deabster, John Q. Easton, and Yeow M. Thum, *School Reform, Retention Policy, and Student Achievement Gains* Chicago: Consortium on Chicago School Research (1995) found at <http://www.consortium-chicago.org>.

⁴⁰ The Courts, Validity, and Minimum Competency Testing. (George F. Madaus, ed., Boston: Kluwer Nijhoff Publishing 1983).

⁴¹ 474 F. Supp. 244, 267.

⁴² *Anderson v. Banks*, 540 F. Supp. 761, 765 (S.D. Ga. 1982).

⁴³ 564 F. Supp. at 177-178.

⁴⁴ *Id.*

⁴⁵ 87 F. Supp.2d 667, 670.

⁴⁶ *United States v. Fordice*, 426 U.S. 717, 737-38 (1992).

⁴⁷ Barbara Kato, *Testing Focus Distorts Teaching* (1998) found at <http://www.catalyst-chicago.org/09-98-098wkato.htm>.



*U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)*



NOTICE

Reproduction Basis

- ☒ This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.
- ☐ This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").